EX PARTE OR LATE FILED ORIGINAL

DOW, LOHNES & ALBERTSON, PLLC
ATTORNEYS AT LAW

J. G. HARRINGTON
DIRECT DIAL 202-776-2818
jharrington@dowlohnes.com

WASHINGTON, D.C.
1200 NEW HAMPSHIRE AVENUE, N.W. · SUITE 800 · WASHINGTON, D.C. 20036-6802
TELEPHONE 202-776-2000 · FACSIMILE 202-776-2222
www.dowlohnes.com

ONE RAVINIA DRIVE · SUITE 1600
ATLANTA, GEORGIA 30346-2108
TELEPHONE 770-901-8800
FACSIMILE 770-901-8874

REDACTED – FOR PUBLIC INSPECTION

September 14, 2005

RECEIVED

SEP 14 2005

Federal Communications Commission
Office of Secretary

DOCKET FILE COPY ORIGINAL

Marlene H. Dortch, Esq.
Secretary
Federal Communications Commission
445 12th Street, SW, Room 8B201
Washington, DC 20554

Re: Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area
WC Docket No. 04-223
Written Ex Parte Communications

Dear Ms. Dortch:

I am writing this letter to report that on August 26, 2005, the undersigned, representing Cox Communications Inc. ("Cox"), provided the attached written ex parte memorandum to Michelle Carey, legal advisor to Chairman Martin, Jessica Rosenworcel, legal advisor to Commissioner Copps, Russ Hanser, legal advisor to Commissioner Abernathy, Scott Bergmann, legal advisor to Commissioner Adelstein, Thomas Navin, chief of the Wireline Competition Bureau, Julie Veach, acting chief of the Competition Policy Division of the Wireline Competition Bureau and Jeremy Miller, deputy chief of the Competition Policy Division of the Wireline Competition Bureau. A copy of the email covering the memorandum also is attached to this letter.

The memorandum contained information for which Cox seeks confidential treatment pursuant to the *Protective Order* issued in this proceeding. The confidential information is marked "REDACTED" on the attached copy of the responses. The confidential portions of the memorandum are being filed today with the Secretary's Office under a separate cover.

In accordance with the requirements of Section 1.1206 of the Commission's rules, an original and one copy of this letter are being filed with the Secretary's Office on this date and copies of this letter are being provided to the recipients of the memorandum.

No. of Copies rec'd 0+1
List ABCDE

Please inform me if any questions should arise in connection with this letter.

Respectfully submitted,

J.G. Harrington
Counsel to Cox Communications, Inc.

Attachment

cc (w/ attachment): Michelle Carey
Jessica Rosenworcel
Russ Hanser
Scott Bergmann
Thomas Navin
Julie Veach
Jeremy Miller

Harrington, J.G.

From: Harrington, J.G.

Sent: Tuesday, September 13, 2005 6:27 PM

To: 'michelle.carey@fcc.gov'; 'Jessica.Rosenworcel@fcc.gov'; 'Russ.Hanser@fcc.gov'; 'Scott.Bergmann@fcc.gov'; 'Thomas.Navin@fcc.gov'; 'Julie.Veach@fcc.gov'; 'jeremy.miller@fcc.gov'

Subject: Cox Communications Ex Parte Submission - Qwest petition for forbearance, WC Docket No. 04-223

Attachments: CoxResponsetoAugust30ExParte091305Confidential.doc

---

Confidential - Subject to Protective Order

Please find attached the Response of Cox Communications to Qwest's August 30 ex parte memorandum in the above-referenced proceeding. This response addresses a variety of issues raised by Qwest's memorandum, including the significance of collocation to Cox and other CLECs in Omaha.

The response contains information subject to the protective order in this proceeding.

In accordance with Section 1.1206 of the Commission's rules, notice of this written ex parte communication will be filed with the Secretary's office by the close of the business day following the submission of this memorandum.

Please inform me if any questions should arise in connection with this message.

Respectfully submitted,

J.G. Harrington

Counsel to Cox Communications, Inc.

Dow, Lohnes & Albertson, P.L.L.C.
Suite 800
1200 New Hampshire Avenue
Washington, D.C. 20036
202/776-2818 (v)
202/776-2222 (f)
jharringto@dlalaw.com

COX COMMUNICATIONS

RESPONSE OF COX COMMUNICATIONS
TO QWEST AUGUST 30 EX PARTE MEMORANDUM
WC DOCKET NO. 04-223

SEPTEMBER 13, 2005

This memorandum responds to the August 30, 2005 *ex parte* memorandum filed by Qwest in the above-referenced proceeding.[1] Cox is submitting this response to correct significant inaccuracies in Qwest's characterizations of the data provided to the Commission by Cox and of Cox's positions in this proceeding. Moreover, as described below, even if Qwest's characterizations were correct, they would have no effect on the proper analysis in this proceeding.

As an initial matter, Cox objects to Qwest's mischaracterization of the Cox filings that were the subject of the August 30 memorandum. Cox's June 30 and August 22 filings were made in response to staff inquiries, addressed those questions specifically, and were not initiated by Cox. For instance, nowhere in the August 22 filing did Cox state that it "needed" "unbundled DS1 and DS3 facilities at below-tariff rates." It simply provided information requested by the staff on the number of businesses in the Omaha MSA that could use high-capacity facilities and the number of those that were within Cox's actual service area.

In the same vein, Qwest rewords and manipulates the language in Cox's August 22 filing to create an argument that Cox never made. Qwest even places its own language in quotation marks and underlines it to create the completely misleading impression that it is quoting Cox.[2] Furthermore, Qwest's statement that Cox "decline[d] to identify" the amount of construction necessary to reach additional customers is untrue because Cox never was asked to do so.

These tactics suggest desperation and tread perilously close to abuse of the Commission's processes. Qwest knew that these filings were made in direct response to staff questions – both filings said so in the very first paragraph. Qwest also knew that Cox did not make the arguments described in Qwest's August 30 filing, but said so nevertheless. Consequently, the Commission should accord no weight to Qwest's hypothetical claims.

Geographic Coverage

As noted above, Cox provided information on its geographic coverage in direct response to a staff inquiry. Cox made no claims concerning the number of customers it could serve other than to note that the coverage estimates did not account for multiple-tenant environments ("MTEs") that are within its coverage area but cannot be served.[3]

---

[1] The Qwest filing responds to three *ex parte* filings by Cox, made on June 30, August 12 and August 22.
[2] *Compare* Cox August 22 *ex parte* to Qwest August 30 *ex parte* at 3 ("Cox does not have current plans in its capital budget to serve the additional [REDACTED] customers.") (underlined and in quotation marks in original).
[3] This issue is discussed in more detail below.

The Qwest filing argues that Cox's geographic coverage must significantly understate its population coverage. The basis for this claim is *Qwest's* estimate of *its own* coverage of two wire centers with facilities at the level of *DS-1* or higher.[4] This information is entirely irrelevant. Qwest's facilities are not Cox's facilities, and Cox's ability to provide telephone service is entirely unconnected to the level of Qwest's DS-1 availability.

It is true (and entirely unsurprising) that Cox's population coverage sometimes is greater than its geographic coverage. However, the correlation between geographic coverage and covered population is very strong, and in most cases in the Omaha MSA there are very few differences between the two. Indeed, if MTEs are considered, in some cases Cox actually covers a smaller percentage of the population than of the land area in a wire center. Moreover, Qwest has provided no actual data to contradict Cox's factual response to the staff questions on this topic. Thus, there is no basis for Qwest's argument that the Commission should disregard the information provided by Cox.

Unbundled Elements

According to Qwest, Cox claims that the Commission should deny forbearance as to unbundled elements so that Cox can "save money." This is entirely incorrect. Cox's consistent position in this proceeding has been that Qwest has failed to demonstrate that it has met the statutory test for forbearance from Section 251(c) obligations.

Qwest's manipulation of the data provided by Cox in response to staff requests does nothing to change that. Qwest still has not met its burden of demonstrating that the elimination of any of its obligations would not harm competition or benefit the public interest in any way – a burden that Section 10 and FCC precedent requires it to meet before forbearance from Section 251(c) can be granted. Moreover, even if the Commission were to consider Qwest's irrelevant claims concerning market share, the information Cox has provided demonstrates conclusively that Cox is a minor part of the enterprise market in the Omaha MSA and currently reaches only a small minority of potential enterprise customers with its own facilities. Thus, even by Qwest's standards, there is no basis for granting forbearance as to the business market.

Interconnection and Collocation

Qwest's analysis of Cox's August 12 *ex parte* filing continues to mischaracterize Cox's position in this proceeding. Qwest concludes that "the key" to Cox's position is its desire for transit service.[5] Again, this is entirely incorrect.

---

[4] Qwest August 30 ex parte at 2-3 ("In fact, Qwest currently has DS1 and DS3 facilities in less than 45 percent of the geographic area of the [REDACTED] wire center and just 30 percent of the area of the [REDACTED] wire center.").

[5] *Id.* at 4-5. Curiously, Qwest says that Cox fails to identify the "key interconnection rights" (a phrase that is not used in Cox's August 12 filing, but that Qwest places in quotation marks) Cox wants even though the August 12 filing lists five specific requirements that Cox believes should remain in place and even though Qwest then says that Cox has identified transiting as a required element.

While Cox believes, for reasons it has described in other proceedings, that transiting is an ILEC obligation, the core question in this proceeding is whether Qwest can be allowed to avoid the requirements of Section 251(c) without demonstrating that there are meaningful alternatives to the interconnection elements needed by facilities-based competitive LECs to offer competitive phone services. The scope of the Section 251(c) interconnection obligation does not affect the analysis the Commission must perform, and Qwest has made no showing at all that there are any alternatives to interconnection with Qwest in the Omaha MSA. Indeed, the record evidence shows that Qwest remains as the one indispensable source of interconnection and Qwest has provided no evidence to refute this showing.[6]

Qwest also has failed to make any case that it is entitled to relief from collocation. Collocation often is the most economically efficient form of interconnection, and imposes little burden on Qwest or any other ILEC. In fact, collocation need not be provided unless there is **unused** space in the ILEC central office. The ILEC also receives compensation for the space, revenue it would not otherwise receive. Qwest's theory that, to continue to collocate with Qwest, Cox must show that "it could not interconnect with Qwest through alternative means" is nonsense because that theory would justify forbearance from collocation for all ILECs, regardless of the state of the local telephone markets.[7]

Congress specifically decided that CLECs should be accorded collocation rights because it knew that ILECs would not make this economically efficient form of interconnection available unless they were obligated to do so.[8] In addition, eliminating Cox's collocation rights would mean that Qwest could force Cox to expend considerable resources to establish entirely new interconnection arrangements, or could raise collocation rates to levels that far exceed cost or competitive market rates, even though there is nothing wrong with or harmful to Qwest about the current arrangements. Raising Cox's costs of providing service to telephone customers and disrupting its existing interconnection arrangements in this fashion would affirmatively harm competition and the public interest, and would have no countervailing benefit to telephone consumers in Omaha.

Collocation is critical to Cox's operations in Omaha for a variety of reasons. First, as Cox previously has described, [REDACTED] percent of Cox's traffic in the Omaha MSA goes

---

[6] Among the other misstatements in Qwest August 30 filing is the argument that "Cox claims that upon being granted non-dominant status, Qwest will simply stop interconnecting with Cox, withdraw all of its tariffs, and cease complying with federal rules . . ." As reflected repeatedly in Cox's filings in this proceeding, Cox does not oppose grant of nondominant status, which appropriately may be based on retail market share analysis. Forbearance from carrier-to-carrier obligations, however, is unrelated to retail market share, and therefore Qwest's showing is inadequate.

[7] "Alternative means" have been available as a theoretical matter since before the 1996 Act. Experience shows, however, that the interconnection alternatives preferred by ILECs, including Qwest, impose significant, unwarranted costs on CLECs and other interconnecting parties. For instance, ILECs have sought to require CLECs to interconnect at every end office, even though they do not make such demands of other ILECs or wireless providers, and, prior to the 1996 Act, demanded that wireless carriers pay termination fees that exceeded costs by enormous margins.

[8] The Commission agreed: "We believe that incumbent LECs have the incentive and capability to impede competitive entry by minimizing the amount of space that is available for collocation by competitors." Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, *First Report and Order*, 11 FCC Rcd 15499, 15797 (1996).

through its two collocation arrangements with Qwest. These collocation arrangements account for **all** of Cox's interconnection with Qwest in the MSA.[9] Further, because Cox's collocation facilities are used for direct, cage-to-cage interconnection with other CLECs in Omaha, an even greater percentage of Cox's traffic is dependent on those arrangements.[10] If Qwest were not required to provide collocation in accordance with the Commission's rules and chose to charge Qwest-defined "market" rates for use of the otherwise unused space devoted to collocation or to greatly limit its availability, then all CLECs' costs would be increased significantly and their interconnection arrangements with other providers could be disrupted. Worse, if Qwest simply chose not to permit collocation, CLECs could not build and use their own facilities to interconnect with Qwest's network and, instead, would be required to purchase interconnection facilities only from Qwest.

It also is important to recognize that Qwest need not deny collocation or inflate the prices it charges to disrupt the operations of CLECs. Qwest could provision collocation using whatever protracted application and installation interval it chose. Qwest could limit the types or vendors of collocated equipment permitted or require that such equipment meet design and performance standards more stringent than those applicable to its own equipment.[11] Qwest could refuse to offer cageless or shared-space collocation or insist on virtual collocation. Qwest also could place conditions on collocation that would affect the ability of CLECs to maintain or repair their facilities or that otherwise increase CLEC costs. For instance, Qwest could require that CLECs provide 48 hours notice before having access to physical collocation facilities, or require that all CLEC technicians visiting collocated facilities be accompanied by Qwest technicians, for which CLECs could be charged at rates set by Qwest. By impairing CLEC access to collocated facilities in this way, Qwest could increase CLEC costs and make it difficult for CLECs to maintain the reliability of their service.

In addition, the Commission should recognize that Qwest's market power is not limited by the borders of the Omaha MSA. Qwest remains by far the largest carrier in either Nebraska or Iowa, with about three times as many lines as Cox in Nebraska and between fifteen and twenty times as many lines as Cox in Iowa and vastly greater geographic scope and coverage.[12] These differences, and particularly the breadth of its network, give Qwest important advantages in any negotiations with Cox and other CLECs. In the absence of a collocation requirement, it is likely that Qwest would exploit its bargaining leverage to significantly alter or eliminate any

---

[9] Cox understands that questions have been raised concerning the importance of collocation because Cox interconnects via collocation at only two locations. The simple answer to those questions is that Cox has two collocations because that is what it needs to interconnect with Qwest. Each of the two collocations is critical to Cox's operations in Omaha, and to the efficient and cost-effective exchange of traffic between Cox and Qwest. Indeed, Cox has installed more than [REDACTED] interconnection trunks at these locations just to exchange traffic with Qwest.

[10] Because Cox and other CLECs and wireless carriers interconnect directly with Qwest at its tandems using collocation, these carriers necessarily have invested in and deployed significant quantities of transport equipment at these hubs. With such a rich concentration of facilities located at Qwest's tandems, it is especially efficient and economical for these carriers to cross-connect their facilities with one another there, rather than building and/or buying separate transport routes between their networks.

[11] A similar tactic was used by AT&T to prevent other companies from providing CPE prior to the Commission's creation of Part 68 of the rules.

[12] Of course, Qwest also is a much larger telephone company than Cox overall. In the residential segment of the market alone, Qwest has nearly 8 million customers, while Cox has about 1.4 million.

collocation arrangements it has today because such an action would be in its business interests, regardless of the public interest effects of such changes.

In response to these concerns, Qwest continues to rely on its theory that Section 251(a) and other provisions of the Communications Act will protect CLECs in Omaha as effectively as Section 251(c). This argument begs the question of why Section 251(c) was created in the first instance. Moreover, given the dearth of Commission, state PUC and court pronouncements about Section 251(a), the most immediate result of granting forbearance and requiring Cox and other CLECs to rely exclusively on Section 251(a) would be extensive and costly litigation that would unnecessarily threaten the provision of competitive phone service in Omaha.

MTEs

Qwest either has no understanding of the issues relating to access to MTEs or deliberately misstates the facts. Qwest claims that, as a franchised provider of cable service in Omaha, Cox automatically has rights to access to MTEs, but this is not the case. Cox's cable franchises grant it the right to use the public rights of way and easements, but do not grant it a right to access to private property. Consequently, Cox must obtain permission from property owners before it can install cable facilities on their premises.

Not all building owners give Cox access to their buildings. An owner may, for instance, choose to enter into a contract with a satellite provider, or demand that Cox pay unreasonable fees to obtain access. In those cases, Cox will have no facilities at all in the MTE. In other cases, Cox must obtain separate permission to provide telephone service, because doing so requires the installation of additional facilities in a building's equipment room. Obtaining access may require difficult negotiations, or a building owner simply may be uninterested in giving tenants a choice for telephone service. Whatever the many reasons for refusal, Cox cannot force an owner to provide access.

Indeed, in some markets Cox must depend on the availability of inside wire subloops under the Commission's unbundling rules because the demarcation point for the building wiring is at the customer premises, not at the minimum point of entry to the building. While Cox is not required to purchase inside wire subloops in Omaha, the possibility of a need for such facilities illustrates why it is important for the Commission to engage in fact-specific, market-by-market analysis in forbearance proceedings, rather than making blanket assumptions about access to potential customers.

Conclusion

Qwest's August 30 filing provides no basis for the Commission to grant it forbearance from any provision of Section 251(c).[13] Instead, Qwest continues its pattern of misstating and distorting the facts in this proceeding. Qwest's request for forbearance therefore should be denied.

[13] As before, Cox does not oppose Qwest's request for nondominant status.